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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1631

EDWARD L. KIRKLAND and NATHANIEL HAYES, *et al.*,

Petitioners,

v.

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari on Behalf of Respondents, Albert M. Ribeiro and Henry L. Coons.

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Statement.

Albert M. Ribeiro and Henry L. Coons, intervenors-appellants in the appeal below, respectfully submit this brief in opposition to petitioners' petition for a writ of certiorari, pursuant to a request for submission of such a response by the Honorable Clerk of this court. We will refer to petitioners Kirkland and Hayes as "petitioners" and to Ribeiro and Coons as "respondents" for purpose of this brief.

Respondents are represented by Council 82, American Federation of State, County and Municipal Employees, AFL-CIO [Council 82], the duly recognized negotiating representative for a unit including Correction Officers and Sergeants employed by the New York State Department of Correctional Services. It is the position of respondents and Council 82 that Correctional Officers, Ser-

geants, and all other employees of the Department within the competitive civil service should be appointed on the basis of fair and open examinations, free from any bias whatsoever. Respondents and Council 82 believe that such a policy promotes the goal of a professional staff capable of dealing with the complex problems posed by New York's overcrowded and dangerous correctional institutions. Respondents and Council 82 thus oppose any quota system based on race, ethnic background, or any other such nonability related criteria. They are fully sympathetic with the efforts of Black, Hispanic, and other such groups to be fairly employed, absent any discrimination of any kind; however, respondents do not believe that quotas lead to the highly professional work force required by the modern correctional system.

Consequently, based on the legal precedent discussed hereafter, respondents believe that the Court of Appeals was correct in reversing so much of the District Court's order as provided for promotion by quota following the establishment of new civil service testing procedures. Respondents therefore respectfully request this court to deny the petition for a writ of certiorari.

Respondents take no position on the question of the award of counsel fees to petitioners.

POINT I.

The United States Court of Appeals for the Second Circuit was correct in reversing so much of the District Court's order as provided for promotion by quota following the establishment of new Civil Service testing procedures for Correctional Sergeants.

Recent decisions of this court and of Federal Courts support so much of the decision sought to be reviewed as strikes down racial quotas.

The portion of the decree of the District Court ordering racial quotas for Correctional Sergeants following the creation of new civil service testing procedures is set forth in the petition for a writ of certiorari, pages 20a-21a. The portion of the opinion of the Court of Appeals reversing the imposition of quotas is set forth in said petition at page 41a.

The basis of the New York State civil service system is appointment based wholly on merit, fitness and ability as determined by competitive examination (*N. Y. Constitution,* Art. 5, §6). Race should not be added as a criterion for appointment to the disadvantage of candidates who have shown merit on the basis of a validated nondiscriminatory test, as provided for in the uncontested portions of the decisions below.

This court recently held in *McDonald v. Sante Fe Trail Transp. Co.,* U. S. , 96 S. Ct. 2574 (1976), that Title VII of the Civil Rights Act of 1964 prohibited discrimination against whites, as well as against minority groups. At page 2577, this court held that the ruling followed *Griggs v. Duke Power Co.,* 401 U. S. 424 (1971), where "• • • [d]iscriminatory preference for any [racial] group, minority or majority • • •" was proscribed. This court cited with approval at page 2578 EEOC interpretations which:

> "• • • consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites • • •."

McDonald also held (p. 2581) that 42 U. S. C. §1981 prohibits discrimination against whites.

There was no proof in this action of any intentional discrimination. Once a job-related, racially neutral, and validated test for Correctional Sergeants is established pursuant to the decisions below, there should be no imposition of racial quotas. This conclusion is supported by *Washington v. Davis,* U. S. , 96 S. Ct. 2040 (1976).

In *Washington* this court held that the disproportionate racial impact of a facially neutral written test for police officers did not warrant a conclusion that the test was a discriminatory device giving rise to a Fifth Amendment claim of deprivation of due process. This court stated at page 2047:

> "But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."

Washington specifically upheld a test seeking to "upgrade the communication abilities of its employees," stating at pages 2050-51:

> "• • • we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups."
>
> • • •
>
> "Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed."

While *Washington* notes at page 2051 that Title VII requires more rigorous validation than does due process under the Fifth Amendment, the Court of Appeals herein specifically provided for validation insofar as feasible (petition, p. 41a). Thus, *Washington* supports the conclusion of the Court of Appeals that:

> "In view of the limited scope of the issues framed in this class action and the paucity of proof concerning past discriminations, we feel that the imposition of permanent quotas to eradicate the effects of past discriminatory practices is unwarranted" (Petition, p. 35a).

As the Court of Appeals correctly applied the principles set forth in *Washington,* the petition for a writ of certiorari should be denied.

Respondents respectfully disagree with the implication at pages 9-10 of the petition that the District Court's quota system is supportable on the grounds that it "place[s] victims of racial discrimination in the position they would have been in but for the discrimination" (citing, *inter alia, Franks v. Bowman Transp. Co.,* 44 U.S.L.W. 4356). It should be noted that the fifth decretal paragraph of the District Court Decree (petition, p. 21a), ordering appointment of one Black or Hispanic employee for each three white employees so appointed, is not limited in effect to the members of the aggrieved class. Thus, its impact would not be to redress past wrongs flowing from prior invalid examinations. Moreover, the decree would probably have the effect of injuring whites who took and passed the invalid tests in good faith, and who might demonstrate their merit on future validated tests.

Bowman, supra, involved a radically different factual situation. First, plaintiffs in *Bowman* had been subjected to racially discriminatory hiring practices. No such deliberate practices were demonstrated in this action. Secondly, in *Bowman,* identifiable employees sought seniority rights which could be ascertained with reasonable precision. In this action, the racial quotas do not enure to the benefit solely of persons who suffered ascertainable harm as the result of prior discrimination. Rather, the District Court used a "shot gun" approach whereby a certain number of minority persons would be entitled to positions as Correctional Sergeants regardless of the number of such persons actually harmed by prior discrimination. This is a wholly different case than *Bowman.* Once racially neutral, validated, job-related examinations are given, minority candidates will be given a full and complete right to seek and obtain positions on the basis of demonstrated merit. As the Court of Appeals pointed out (petition, p. 39a), the District Court order benefited an ever-expanding pool of minority employees wholly unrelated to past discrimination, ignored New York Civil Service Law, and constituted reverse discrimination. This is far different from *Bowman's* rectification of past wrongs.

Finally, the Court of Appeals distinguished such prior cases providing quotas as *Rios v. Steamfitters Local 638,* F. 2d (2nd Cir. 1975); *Guardians Inc. v. Bridgeport Civ. Serv. Comm.,* 482 F. 2d 1333 (2nd Cir. 1973); *Vulcan Society of New York City Fire Dept. Inc. v. Civil Serv. Comm.,* 490 F. 2d 387 (2nd Cir. 1973), and *Patterson v. Newspaper Deliverers Union,* 514 F. 2d 767 (2nd Cir. 1975), on the grounds that those cases involved clear-cut patterns of long-continued and egregious racial discrimination, and did not involve reverse discrimination (petition, pp. 32a-34a).

The instant case is more closely analogous to recent decisions of this court holding reverse discrimination to be an improper remedy where there was no past history of deliberate racial discrimination. It should be noted that while candidates, and minority candidates not named as plaintiffs below, were also injured by prior sergeant's examinations that were not job-related. These persons should be allowed to compete in the new, validated tests without the court-imposed limitation of racial quotas.

Conclusion.

Respondents Ribeiro and Coons respectfully request this court to deny the petition for a writ of certiorari. As discussed in this response, the Court of Appeals decision, insofar as it reverses the District Court's imposition of racial quotas after the development of a new examination, is in harmony with recent decisions of this court forbidding discrimination against whites as well as minorities, and upholding civil service examinations which are not discriminatory *per se.*

Respondents and Council 82 believe strongly that civil service positions should be open to all qualified persons, regardless of race or other factors not related to competence. However, they likewise support the concept of a civil service based on demonstrated merit, as mandated by the *N. Y. Constitution* and *N. Y. Civil Service Law.*

The correctional institutions of New York are overcrowded and explosively dangerous. The personnel and inmates of the New York Department of Correctional Services are entitled to Correctional Officers appointed

on the basis of merit alone. Only a highly qualified body of Correction Officers, whose merit has been rigorously tested, can adequately serve the great demands for the New York Correctional System.

The petition for a writ of certiorari should be dismissed.

Dated: Albany, New York,
July 28, 1976.

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